United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2215

ORIGINAL

To be argued by:
Michael C. Devine

In The

United States Court of Appeals

For The Second Circuit

B
P/S

NORI SINOTO,

Appellant,

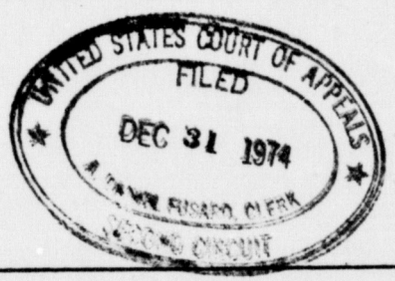
vs.

DEVCO MANAGEMENT, INC. and
DEIGHTON O. EDWARDS, JR.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANT



Butowsky, Schwenke & Devine
Attorneys for Appellant
230 Park Avenue
New York, New York 10017
(212) 725-5360

1

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Issues Presented for Review	iii
Statement of the Case	1
A. Nature of the Case and Facts . .	1
B. Course of Proceedings	3
Point I -- Defendants Failed to Prove Any Defense to the Notes	4
Point II -- No Evidence Should Have Been Taken With Respect to Any Oral Agreement	6
Point III -- Defendants Are Estopped From Asserting that the Notes Were Ineffective Due to Alleged Fraud by the Maker and the Payee	9
Conclusion.	10

TABLE OF AUTHORITIES

Page

A. Cases

Bay Parkway Nat'l Bank v. Shalom, 270 N.Y. 172, 200 N.E. 685 (1936) 10

County Trust Co. v. Mara, 242 A.D. 206, 273 N.Y.S. 597 (1st Dept. 1934) 10

Ford v. Hahn, 269 A.D. 436, 55 N.Y.S.2d 854 (1st Dept. 1945) 8

Jamestown Business College Ass'n v. Allen, 172 N.Y. 291, 64 N.E. 952 (1902) 8

Levy v. Mindlin, 21 Misc.2d 938, 194 N.Y.S.2d 209 (Sup. N.Y. 1959). 5

Manufacturers Trust Co. v. Palmer, 13 A.D.2d 772, 215 N.Y.S.2d 840 (1st Dept. 1961) . . . 8, 10

Mount Vernon Trust Co. v. Bergoff, 272 N.Y. 192, 5 N.E. 2d 196 (1936). 9

West End Federal Savings & Loan Ass'n v. DiBoise, 19 A.D.2d 476, 244 N.Y.S.2d 282 (3d Dept. 1963). 10

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did defendants sustain their burden of proof as to any defense to the Notes?

II. Whether the district court erred in accepting testimony of an alleged parol agreement contrary to the terms of the written agreement.

III. Whether defendants' contested allegations that the Notes were to be used in a scheme to defraud a bank-lender state a defense to the Notes, assuming arguendo that such allegations were proved.

74-2215

In The

United States Court of Appeals

For The Second Circuit

NORI SINOTO,

Appellant,

vs.

DEVCO MANAGEMENT and DEIGHTON O. EDWARDS, JR.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

A. Nature of the Case and Facts.

Plaintiff, Nori Sinoto, is a citizen of

Japan, currently residing in New York County (13a).*

Defendant Devco Management, Inc. ("Devco") is a Delaware corporation, having its principal office in New York County (13a). Defendant Deighton O. Edwards, Jr. is a United States citizen, at all relevant times a resident of New York State (13a).

Devco was organized formally in March, 1972, by defendant Edwards, who became its majority shareholder and chief executive officer (57a). It was started as a minority group or black-owned company in the business of waste management (35a).

Plaintiff conceived Devco's business, and prior to its formation he advised Edwards regarding its organization and development (33a-37a). In consideration for his contributions to the business, it was agreed that plaintiff would own 50% of Devco (39a, 51a-53a).

As of April, 1972, Edwards had not performed this agreement, and therefore plaintiff demanded of the company, and of Edwards, alternative compensation for his services (46a-51a). Edwards thereupon signed

---

* References to the Appendix are denoted simply by the Appendix page number. In the Appendix certain pages from the trial transcript bear handwritten notations. These were made by plaintiff. They are unofficial and were not before the district court. Appellant requests that they be disregarded and apologizes for the oversight.

and delivered to plaintiff six documents: four promissory notes totalling $50,000 ("Notes") (129a-136a), a letter reciting the existence of consideration (137a), and a personal financial statement showing his ability to pay the Notes (138a).

The Notes were not paid on their maturity dates, and thus on September 13, 1972, plaintiff made formal presentation (13a). Payment was refused, and no payment was made thereafter (13a-14a).

Based upon the district court's diversity of citizenship jurisdiction, plaintiff here sues on the Notes. Defendants offered two defenses:* lack of consideration, and invalidity because the Notes were "procured by fraud" (the allegation was that the Notes were not to be presented or negotiated and that they were completed after signature) (10a-11a, 14a-15a).**

B. Course of Proceedings.

The action was tried without a jury in the Southern District of New York in March, 1974. After

---

* Originally three defenses were pleaded. However, the first, a jurisdictional defense, was abandoned (12a).

** Defendants also pleaded a so-called "set-off," which it never attempted to prove (11a).

trial the district court found that there was consideration for the Notes and that the Notes were completed prior to signature (198a; 141a). However, it found that the Notes were not notes "in any conventional sense" and dismissed the complaint (142a).

Plaintiff appeals from the dismissal order and judgment dismissing his complaint (143a).

POINT I

DEFENDANTS FAILED TO PROVE ANY DEFENSE TO THE NOTES

The Notes and the letter which accompanied them are complete on their face. They are standard in form and fully executed. The Notes were presented but not paid.

There is no dispute about any of this. Plaintiff's prima facie case was proved.

The issue at trial was whether defendants could establish any defense to the Notes. They asserted two:

(a) lack of consideration;

(b) invalidity due to fraud, allegedly because the Notes were completed after signature and were not to be negotiated or presented (10a-11a, 14a-15a).

The lack of consideration defense and the allegation that the Notes were completed after signature were wholly baseless, and appear to have been rejected out-of-hand by the district court.* Nor did defendants prove any fraud defense based upon a non-presentation or non-negotiation understanding.

However, the district court seems to have found an unalleged ground for dismissal, which might be referred to as the defense of "unconventionality". The district court refused to enforce the Notes because they were not "conventional" (142a). The term is not defined, and no authority is relied upon. Appellant has found no authority for the proposition that an unconventional note is unenforceable.

However, appellant's primary point is more basic; namely, if a written, negotiable instrument is complete and unambiguous on its face, and if the trier of fact is unable to determine from the evidence presented what, if anything, is the unwritten intention of the parties; can the instrument be denied effect? Stated affirmatively: defendants have the burden of proof with respect to defenses. Levy v. Mindlin, 194 N.Y.S. 2d 209,

---

* The court referred to the defenses as "mostly irrelevant" (141a).

21 Misc. 2d 938, 987 (Sup. N.Y. 1959). They argued that the Notes did not reflect the intention of the parties, but failed to make a record from which the trier of fact could determine any intention other than that shown by the documents. Therefore, they failed to carry their burden of proof, and the Notes should have been enforced in accordance with their terms.

Defendants' failure to carry their burden of proof is apparent from several statements in the opinion below; e.g., "the testimony of the parties is anything but clear" (141a), "it is not at all clear why the parties thought that these notes could be used as a means of raising cash," and "I can come to no firm conviction as to what the parties did intend," (142a). Following the last of these phrases the district court nevertheless concluded that the parties did not consider the Notes to be "conventional," and it is that conclusion alone which founded the decision. This is error. The plaintiff cannot be denied the value of the Notes, for defendants have the burden of proof and failed to sustain it.

POINT II

NO EVIDENCE SHOULD HAVE BEEN TAKEN WITH RESPECT TO ANY ORAL AGREEMENT.

During his testimony at trial the defendant Edwards was asked to state the circumstances surrounding

his execution of the Notes (60a). Under the guise of providing such an explanation, Edwards rambled on in several long answers setting forth a totally new and unique theory of his understanding of the Notes (60a-72a). Although (as the Court later found) Edwards' explanation was unclear and incredible, it also was inadmissible because it sought to prove a parol agreement between the parties that the Notes would be used to defraud a bank.

Although plaintiff testified that this was not his understanding (50a-53a, 122a-124a), Edwards' shocking theory was that he and plaintiff had meant to defraud a bank (a potential lender) by showing completely valueless notes as "side collateral" for a loan to plaintiff (63a-64a, 79a-81a). Defendants had not pleaded any such oral agreement to defraud (10a-11a).

The district court allowed this testimony of a parol agreement varying the terms of the written Notes.* However, Edwards was a totally incredible witness and the district court appears to have so found. In its

---

* A general objection to parol evidence was made at page 60 of the trial transcript and overruled. Unfortunately page 60 of the transcript is not part of the Appendix.

decision it states that it relied "almost exclusively upon plaintiff's testimony" (141a). Thus the admission of Edwards' testimony should have been harmless, but the district court nevertheless failed to enforce the Notes in accordance with their terms, and it must be inferred that the inadmissible parol played some part.

It is well settled law in New York, as elsewhere, that an alleged oral agreement varying the unconditional obligations of notes is not a defense. Manufacturers Trust Company v. Palmer, 13 A.D. 2d 772, 215 N.Y.S. 2d 840 (1st Dept. 1961); Ford v. Hahn, 269 App. Div. 436, 55 N.Y.S. 2d 854 (1st Dept. 1945). Jamestown Business College Ass'n v. Allen, 172 N.Y. 291, 64 N.E. 952 (1902).

On cross-examination by defendants, and by the district court, plaintiff also testified to the intention of the parties in executing and delivering the Notes (50a-53a, 122a-124a). This testimony also should have been excluded. However, unlike Edwards testimony, that of plaintiff was credible, and the understanding of the parties as described by plaintiff is thoroughly consistent with his claim that the Notes are valid and enforceable. In essence, plaintiff said that if defendants had delivered to him 50 percent of

the equity ownership of Devco before the Notes matured or were pledged as collateral for a personal borrowing, he would have returned the Notes. Even if proof of this condition subsequent were admissible, the condition was not satisfied. As of the date of presentment the Notes remained valid and enforceable.

POINT III

DEFENDANTS ARE ESTOPPED FROM ASSERTING THAT THE NOTES WERE INEFFECTIVE DUE TO ALLEGED FRAUD BY THE MAKER AND THE PAYEE

Even if it could be found from the record below -- which appellant strongly denies -- that plaintiff and Edwards wrongfully arranged to defraud a lender with valueless notes, and even if testimony of such an intention could survive the parol evidence rule, the law in New York is clear that such a defense would be against public policy.

In Mount Vernon Trust Co. v. Bergoff, 272 N.Y. 192, 5 N.E. 2d 196 (1936), the Court of Appeals stated the applicable rule:

> "Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." (p. 196).

The rule has been followed without exception. See West End Federal Savings & Loan Ass'n v. DiBoise, 19 A.D. 2d 476, 244 N.Y.S. 2d 282 (3d Dept. 1963); Bay Parkway Nat'l Bank v. Shalom, 270 N.Y. 172, 200 N.E. 685 (1936); County Trust Co. v. Mara, 242 A.D. 206, 273 N.Y.S. 597 (1st Dept. 1934); Manufacturers Trust Co. v. Palmer, 13 A.D. 2d 772, 215 N.Y.S. 2d 840 (1st Dept. 1961).

The public policy is clear: No person, particularly a former banker (such as Edwards), who seeks to avoid the effect of valid notes by a subsequent confession of fraudulent intent should have the aid of the courts in carrying out the fraud. This is even clearer where the payee and the documents deny the fraud. Edwards' allegations of a scheme to defraud a lender were a belated concoction devised to escape liability on the valid Notes. They must, as a matter of public policy, be disallowed as a defense.

CONCLUSION

The district court's decision must be reversed and judgment must be granted for plaintiff because (1) the defendants have the burden of proof, and failed to prove any defense to plaintiff's prima facie case, (2) the parol agreement alleged by defendants cannot, as a

matter of law, be considered; and (3) defendants' allegations of a scheme to defraud cannot, as a matter of public policy, be a defense.

Respectfully submitted,

BUTOWSKY, SCHWENKE & DEVINE

Of Counsel:
Michael C. Devine
S. Pitkin Marshall

SERVICE OF 2 COPIES OF THE WITHIN

Brief

IS HEREBY ADMITTED.

DATED: 12/31/74

Maxwell Edelstein

Attorney for Def